

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

MARCELL JONES,

No. 2:22-cv-01707 KJM DB P

Plaintiff,

ORDER

v.

B. BROWNEN, et al.,  
Defendants.

Plaintiff, a state prisoner, proceeds without counsel and seeks relief under 42 U.S.C. § 1983. This matter was referred to the undersigned by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1). Plaintiff's complaint filed on September 27, 2022 (ECF No. 1), is before the court for screening. Plaintiff has also requested appointment of counsel. (ECF No. 3.)

Liberally construed, the complaint states a claim against defendant Brownen under the First Amendment and a claim against defendant Rangel under the Fourteenth Amendment. No other claims are cognizable as pleaded. Within 30 days, plaintiff must inform the court how he chooses to proceed.

**I. In Forma Pauperis**

Plaintiff seeks to proceed in forma pauperis. (ECF No. 2.) Plaintiff's declaration makes the showing required by 28 U.S.C. § 1915(a). The motion is granted.

1           **II.     Screening Requirement**

2           The court is required to screen complaints brought by prisoners seeking relief against a  
3 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The  
4 court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally  
5 “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek  
6 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2).  
7 A claim is legally frivolous when it lacks an arguable basis either in law or in fact. Neitzke v.  
8 Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th Cir.  
9 1984). The court may dismiss a claim as frivolous if it is based on an indisputably meritless legal  
10 theory or where the factual contentions are clearly baseless. Neitzke, 490 U.S. at 327. The critical  
11 inquiry is whether a constitutional claim has an arguable legal and factual basis. See Jackson v.  
12 Arizona, 885 F.2d 639, 640 (9th Cir. 1989); Franklin, 745 F.2d at 1227.

13           Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a short and plain statement  
14 of the claim that shows the pleader is entitled to relief. Bell Atlantic Corp. v. Twombly, 550 U.S.  
15 544, 555 (2007). In order to state a cognizable claim, a complaint must contain more than “a  
16 formulaic recitation of the elements of a cause of action;” it must contain factual allegations  
17 sufficient “to raise a right to relief above the speculative level.” Id. The facts alleged must “give  
18 the defendant fair notice of what the... claim is and the grounds upon which it rests.” Erickson v.  
19 Pardus, 551 U.S. 89, 93 (2007) (quoting Twombly, 550 U.S. at 555). In reviewing a complaint  
20 under this standard, the court accepts as true the allegations of the complaint and construes the  
21 pleading in the light most favorable to the plaintiff. See id.; Scheuer v. Rhodes, 416 U.S. 232, 236  
22 (1974).

23           **III.     Allegations in the Complaint**

24           On July 10, 2021, defendant Brownen and co-workers conducted a body search of  
25 plaintiff and did not find any contraband. Plaintiff requested that Brownen document the search  
26 results which caused Brownen to become upset. Brownen then used plaintiff’s work equipment as  
27 a false basis for an illegal cell search without probable cause. The search of plaintiff’s cell did not  
28 yield contraband. Brownen then searched the third tier shower and found contraband belonging to

1 another inmate which he falsely documented as having been found in plaintiff's cell. Brownen  
2 falsified a Rules Violation Report ("RVR") to punish plaintiff.

3 Plaintiff appealed the violation and was subsequently targeted by defendant Rangel, who  
4 found plaintiff guilty of the violation despite having knowledge and evidence of staff misconduct.  
5 During the hearing, plaintiff informed Rangel about Brownen's misconduct and that the owner of  
6 the contraband had taken responsibility in a sworn declaration. Rangel ignored plaintiff, denied  
7 his request to call a witness, and found plaintiff guilty based on evidence he knew to be false. The  
8 RVR result affected plaintiff's privileges, programming, and credit.

9 **IV. Screening of the Complaint**

10 **A. General Legal Standards for Claims under 42 U.S.C. § 1983**

11 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege a deprivation of a  
12 constitutional right or federal law under color of state law. See West v. Atkins, 487 U.S. 42, 48  
13 (1988). An individual defendant is not liable for a civil rights violation unless the facts establish  
14 that the defendant's personal involvement in some constitutional deprivation or a causal  
15 connection between the defendant's wrongful conduct and the alleged constitutional deprivation.  
16 See Johnson v. Duffy, 588 F.2d 740, 743-44 (9th Cir. 1978); see also Leer v. Murphy, 844 F.2d  
17 628, 633 (9th Cir. 1988); Monell v. Department of Social Services, 436 U.S. 658 (1978). "A  
18 person 'subjects' another to the deprivation of a constitutional right, within the meaning of  
19 [S]ection 1983, if she does an affirmative act, participates in another's affirmative acts or omits to  
20 perform an act which she is legally required to do that causes the deprivation of which complaint  
21 is made." Johnson, 588 F.2d at 743.

22 **B. First Amendment**

23 The filing of a false report by a prison official against a prisoner is not, by itself, a  
24 violation of the prisoner's constitutional rights. See Freeman v. Rideout, 808 F.2d 949, 951 (2nd  
25 Cir. 1986) (the filing of a false disciplinary charge against a prisoner is not actionable under §  
26 1983 if prison officials provide the prisoner with procedural due process protections); Hanrahan  
27 v. Lane, 747 F.2d 1137, 1140-41 (7th Cir. 1984) (same); Harper v. Costa, No. CIV S-07-2149  
28 LKK DAD P, 2009 WL 1684599, at \*2-3 (E.D. Cal., June 16, 2009), aff'd, 393 Fed. Appx. 488

1 (9th Cir. 2010) (“district courts throughout California ... have determined that a prisoner’s  
 2 allegation that prison officials issued a false disciplinary charge against him fails to state a  
 3 cognizable claim for relief under § 1983”). Nevertheless, a prisoner may state a claim under the  
 4 First Amendment by plausibly alleging a false disciplinary report was filed because of the  
 5 plaintiff’s exercise of a constitutional right. See Hines v. Gomez, 108 F.3d 265, 269 (9th Cir.  
 6 1997).

7 A First Amendment retaliation claim has five elements. Brodheim v. Cry, 584 F.3d 1262,  
 8 1269 (9th Cir. 2009); Watison v. Carter, 668 F.3d 1108, 1114 (2012). First, the plaintiff must  
 9 allege that he engaged in protected conduct, such as the filing of an inmate grievance. Rhodes v.  
 10 Robinson, 408 F.3d 559, 567 (9th Cir. 2005). Second, the plaintiff must allege that the defendant  
 11 took adverse action against the plaintiff. Id. Third, the plaintiff must allege a causal connection  
 12 between the adverse action and the protected conduct. Watison, 668 F.3d at 1114. Fourth, the  
 13 plaintiff must allege that the “official’s acts would chill or silence a person of ordinary firmness  
 14 from future First Amendment activities.” Rhodes, 408 F.3d at 568-69 (internal quotation marks  
 15 and emphasis omitted).<sup>1</sup> Fifth, the plaintiff must allege “that the prison authorities’ retaliatory  
 16 action did not advance legitimate goals of the correctional institution or was not tailored narrowly  
 17 enough to achieve such goals.” Rizzo v. Dawson, 778 F.2d 527, 532 (9th Cir. 1985).<sup>2</sup>

18 Here, defendant Brownen allegedly issued plaintiff a false disciplinary report because of  
 19 plaintiff’s request that Brownen document the results of plaintiff’s body search, which upset  
 20 Brownen. Not every verbal exchange between a prison employee and a prisoner rises to the level  
 21 of protected speech under the First Amendment. See Carl v. Griffin, No. 08-CV-4981  
 22 (RMB/MHD), 2011 WL 723553, at \*5 (S.D.N.Y. Mar. 2, 2011). Here, though, the court can  
 23 reasonably infer for screening purposes that plaintiff was plaintiff was engaged in the exercise of  
 24 protected speech regarding the issue of the requested search receipt. See Ahmed v. Ringler, No.

25 <sup>1</sup> “[A] plaintiff who fails to allege a chilling effect may still state a claim if he suffered some other  
 26 harm,” Brodheim, 584 F.3d at 1269, that is “more than minimal,” Rhodes, 408 F.3d at 568 n.11.

27 <sup>2</sup> A plaintiff successfully pleads a lack of valid penological purpose by alleging facts showing  
 28 that, in addition to a retaliatory motive, the defendant’s actions were arbitrary and capricious or  
 unnecessary to the maintenance of order in the institution. Watison, 668 F.3d at 1114-15.

1 2:13-cv-1050 MCE DAD, 2015 WL 502855, at \*4 (E.D. Cal. Feb. 5, 2015) (finding prisoner's  
2 verbal complaint about the search and seizure of his property constituted protected conduct under  
3 the First Amendment for purposes of a retaliation claim), report and recommendation adopted, No.  
4 2:13-cv-1050 MCE DAD, 2015 WL 1119675 (E.D. Cal. Mar. 11, 2015). Plaintiff states a First  
5 Amendment retaliation claim against defendant Brownen.

6 However, the complaint does not plead facts from which the court can infer that defendant  
7 Rangel took an adverse action that was motivated by plaintiff's protected conduct. No contextual  
8 facts support an inference that defendant Rangel found plaintiff guilty of the rules violation  
9 because of plaintiff's request for a search receipt or his use of the appeals process. The Ninth  
10 Circuit has cautioned against retaliation claims based on the logical fallacy of *post hoc, ergo  
propter hoc* - "after this, therefore because of this." See Huskey v. City of San Jose, 204 F.3d  
11 893, 899 (9th Cir. 2000). "[M]ere speculation that [a defendant] acted out of retaliation is not  
12 sufficient." Wood v. Yordy, 753 F.3d 899, 905 (9th Cir. 2014); see Twombly, 550 U.S. at 555-  
13 557 (naked assertions, labels and conclusions, and formulaic recitations of the elements of a cause  
14 of action do not suffice to plead facts to state a claim). Plaintiff does not state a First Amendment  
15 retaliation claim against defendant Brownen.

### 17 **C. Fourteenth Amendment Due Process**

18 "Prison disciplinary proceedings are not part of a criminal prosecution, and the full  
19 panoply of rights due a defendant in such proceedings does not apply." Wolff v. McDonnell, 418  
20 U.S. 539, 556 (1974) (citation omitted). For prison disciplinary proceedings that include the loss  
21 of good-time credits, an inmate is entitled to (1) twenty-four-hour advanced written notice of the  
22 charges against him, id. at 563-64; (2) "a written statement by the factfinders as to the evidence  
23 relied on and reasons for the disciplinary action," id. at 564, (internal quotation marks and citation  
24 omitted); (3) an opportunity to call witnesses and present documentary evidence where doing so  
25 "will not be unduly hazardous to institutional safety or correctional goals," id. at 566; (4)  
26 assistance at the hearing if he is illiterate or if the matter is complex, id. at 570; and (5) a  
27 sufficiently impartial fact finder, id. at 570-71. A finding of guilt must be "supported by some  
28 evidence in the record." Superintendent v. Hill, 472 U.S. 445, 454 (1985).

1 Plaintiff alleges he informed Rangel the owner of the contraband had taken responsibility  
2 in a sworn declaration, but defendant Rangel denied plaintiff's request to call a witness. In  
3 alleging the RVR affected his credit, plaintiff adequately alleged he lost time credits as a result of  
4 the guilty finding. No facts alleged indicate that allowing plaintiff's witness would have been  
5 "unduly hazardous to institutional safety or correctional goals." Wolff, 418 U.S. at 566. Liberally  
6 construing the complaint, for screening purposes, plaintiff states a Fourteenth Amendment due  
7 process claim against defendant Rangel under the Fourteenth Amendment for the alleged denial  
8 of the right to call witnesses.

9 **D. Other Non-Cognizable Claims**

10 Plaintiff alleges defendant Brownen conducted a "falsified probable cause... illegal  
11 search." (ECF No. 1 at 4.) However, the Fourth Amendment prohibition against unreasonable  
12 searches does not apply in prison cells. Hudson v. Palmer, 468 U.S. 517, 530 (1984). Prisoners  
13 have no legitimate expectation of privacy in their cells. Id.

14 The complaint also references the Sixth Amendment, but the Sixth Amendment pertains to  
15 criminal prosecutions. See U.S. Const. amend. VI. Plaintiff cannot state a claim under the Sixth  
16 Amendment.

17 **V. Appointment of Counsel**

18 Plaintiff has requested appointment of counsel. (ECF No. 3.) The United States Supreme  
19 Court has ruled that district courts lack authority to require counsel to represent indigent prisoners  
20 in § 1983 cases. Mallard v. United States Dist. Court, 490 U.S. 296, 298 (1989). In certain  
21 exceptional circumstances, the district court may request the voluntary assistance of counsel  
22 pursuant to 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991);  
23 Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990).

24 The test for exceptional circumstances requires the court to evaluate the plaintiff's  
25 likelihood of success on the merits and the ability of the plaintiff to articulate his claims in light  
26 of the complexity of the legal issues involved. See Wilborn v. Escalderon, 789 F.2d 1328, 1331  
27 (9th Cir. 1986); Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983). Circumstances common to  
28 most prisoners, such as lack of legal education and limited law library access, do not establish

1 exceptional circumstances that would warrant a request for voluntary assistance of counsel. In the  
2 present case, the court does not find the required exceptional circumstances.

3 **VI. Conclusion and Order**

4 Liberally construed, the complaint states the following claims: (1) retaliation in violation  
5 of the First Amendment by defendant Brownen; (2) Fourteenth Amendment due process violation  
6 by defendant Rangel. No other claims are cognizable as pleaded. Plaintiff is granted leave to  
7 amend.

8 If plaintiff elects to amend his complaint, he has thirty days so to do. This opportunity to  
9 amend is not for the purposes of adding new and unrelated claims. George v. Smith, 507 F.3d  
10 605, 607 (7th Cir. 2007). Local Rule 220 requires that an amended complaint be complete in itself  
11 without reference to any prior pleading. See Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Once  
12 an amended complaint is filed, the original complaint no longer serves a function in the case. Id.  
13 The amended complaint should be titled “First Amended Complaint” and should reference the  
14 case number.

15 In the alternative, if plaintiff wishes to proceed on the complaint, as screened, with his  
16 cognizable claims, he shall so notify the court. Following receipt of such a notice, the court will  
17 order service of defendants Brownen and Rangel.

18 In the further alternative, plaintiff may elect to forego amendment and notify the court that  
19 he wishes to stand on his original complaint. See Edwards v. Marin Park, Inc., 356 F.3d 1058,  
20 1064-65 (9th Cir. 2004). If this option is chosen, the undersigned will issue findings and  
21 recommendations to dismiss the non-cognizable claims without leave to amend, plaintiff will  
22 have an opportunity to object, and the matter will be decided by a district judge.

23 **VII. Order**

24 In accordance with the above, IT IS HEREBY ORDERED:

25 1. The Clerk’s Office shall send plaintiff a blank civil rights complaint form.  
26 2. Plaintiff’s motion to proceed in forma pauperis (ECF No. 2) is GRANTED;  
27 3. Plaintiff’s request for the appointment of counsel (ECF No. 3) is DENIED;

28 ////

1           4. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action as set  
2           forth by separate order.

3           5. 4. Within thirty days from the date of service of this order, plaintiff must file one of  
4           the following:

5           a. A first amended complaint;

6           b. A notice of election to proceed with the complaint as screened;

7           c. A notice of election to stand on the complaint as it was filed; or

8           d. A notice of voluntary dismissal.

9           5. Failure to respond to this order will result in a recommendation that this action be  
10           dismissed.

11           Dated: April 7, 2023



12  
13           DEBORAH BARNES  
14           UNITED STATES MAGISTRATE JUDGE  
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